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JAMES H. McKEN

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff in Error,

v.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS THACHER,
Of Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1906.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error, v. THE PEOPLE OF THE STATE OF COLORADO, on the relation of HENRY A. LINDSLEY, District Attorney, &c.	No. 143.

BRIEF FOR PLAINTIFF IN ERROR.

The writ of error herein (pp. 65–70) brings up for review a judgment of the Supreme Court of Colorado, affirming a judgment of the District Court in Denver, in an action of *quo warranto* brought by the People on the relation of the District Attorney against the plaintiff in error, a New Jersey corporation, to make it answer

> "by what warrant it claims to have, use and enjoy the powers, privileges and franchises aforesaid [that is, such as it got by complying with the Colorado laws as to foreign corporations], and the right to do business as such corporation within the limits of said State,

> and why the *franchise and charter* [secured by compliance with such laws] should not be adjudged *forfeit*, and the respondent *ousted* of the same" (pp. 2-4).

The judgment in the lower court (pp. 34 and 35) is that this corporation has

> "*forfeited its right to do business* within the limits of the State of Colorado until such tax is paid, and it is absolutely and wholly *deprived* of all *rights and privileges* within the State of Colorado, until such tax is paid,"

the tax referred to being "an annual State corporation license tax," amounting to $4,000, found to be due on May 1, 1902, by force of an act of the Legislature of Colorado entitled "An Act in relation to public revenue and repealing all previous acts or parts of acts in conflict therewith," approved March 22, 1902.

The contention of the plaintiff in error being that this act, as so applied to it, is unconstitutional as impairing the obligation of a contract and as denying to this corporation the equal protection of the laws, the status of the corporation at the time when the act was passed becomes important.

There is no substantial dispute about facts,—none at all, except as to whether the corporation in acquiring property in Colorado after compliance with its statutes in April, 1899, relied upon the privilege resulting from such compliance—and that it did, is shown by the testimony of Waterman (p. 48)—and except, also, as to matters not material to this argument. The *facts* stated in the complaint are not denied, and the *facts* stated in the answer, except as aforesaid, are admitted by the reply, conclusions of law not being admitted, of course.

The plaintiff in error, after becoming a corporation under the laws of New Jersey, had, on April 28, 1899, complied with the laws of Colorado relating to foreign corporations, by filing, as required, a cer-

tificate designating a principal place of business in the State and appointing an agent upon whom process might be served, and by filing a certified copy of its certificate of incorporation and of the New Jersey law under which it was incorporated (Complaint, p. 2; Answer, pp. 9–10; Reply, pp. 23–24), and by paying to the Secretary of State "for the use of the State" $9,792.50 (Answer, p. 10; Reply, p. 24), and thereby on said day, as the complaint states (p. 2), it "became and was authorized or permitted to do business in the State of Colorado as such corporation, under and by virtue of the laws of the said State of Colorado"; and from that time on, it "has been and still is doing business as such corporation in the said State of Colorado" (p. 3). On May 17, 1901, the corporation filed, as required by the law of Colorado, a copy of an amendment of its certificate of incorporation increasing its capital stock, and paid to the Secretary of State "for the use of the State," the further sum of $5,250, making, with the sum paid in April, 1899, a total of $15,042.50 so paid for whatever it got by complying with the laws of that State in regard to foreign corporations.

What it so got, depends on the law as then existing. The law bearing on this question was as follows:

Constitution, Art. 15, Sec. 10, which reads:

> "No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."

Mills' Annotated Statutes, Sec. 499, providing that "foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate" as therein described and directed, and that "such corporation shall be subjected to all the liabilities, restrictions

and duties which are or may be imposed upon such corporations of like character organized under the general laws of this state."

Mills' Ann. Stats., Sec. 500, providing that every corporation incorporated by certificate under a general corporation law shall file with the Secretary of State a certified copy of such certificate and of such law.

Mills' Ann. Stats., Sec. 502, providing for payment of a filing fee, and also providing that copies of such charters, statutes and certificates, duly certified, shall be received in the courts "as sufficient evidence of the corporate character of such incorporations, and of all their powers, duties and liabilities."

Mills' Ann. Stats., Sec. 1867, as to filing and recording fees.

And, lastly, Laws of 1897, Chap. 51, providing that every stock corporation, domestic or foreign, on filing its certificate of incorporation, "shall pay to the Secretary of State for the use of the State a fee," which, if the capital stock exceeds $50,000, is fifteen cents on each $1,000 of such excess, and a like fee on each $1,000 of any increase, and that "no such corporation * * * shall have or exercise any corporate powers, or be permitted to do any business in this State until the said fee shall have been paid."

It was under this law last mentioned that the sums aforesaid, aggregating $15,042.50, were paid to the Secretary of State for the use of the State. Manifestly they were paid in order that the corporation might have or exercise its corporate powers and be permitted to do business in the State, or, to follow the form of expression used in the complaint, that it might be "authorized or permitted to do business in said State of Colorado as such corporation"; and to evidence the privilege so purchased, the Secretary of State, on May 21, 1901, gave to the corporation a certificate that it had made full payment of fees and was "authorized to

exercise any corporate powers provided for by law." This certificate was given in accordance with Laws of 1901, p. 121, § 10, 3 Mills. Ann. Stats., 238 (Rec., p. 12).

The law of 1902 found the corporation exercising the privilege so purchased. Since April, 1899, it had been and still was doing business in Colorado, having acquired and being engaged in operating properties there of a value of millions of dollars.

The general effect of that law, if it is valid, is to require the corporation to make further payments annually, if it would continue to exercise the privilege of doing business in Colorado, and to require it to make larger payments than domestic corporations in like circumstances.

The pertinent sections of the law are as follows:

> "SEC. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation from this State, and having a capital stock of $25,000.00 or over, shall pay, on or before the first day of May of each year, or at the time of obtaining such charter or certificate of incorporation, and on or before the first day of May of each year thereafter, as the case may be, an annual State corporation license tax to the auditor of the State of Colorado as follows:
>
> Two cents upon each one thousand dollars of its capital stock."

> "SEC. 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and *as a condition precedent to its right to do any business within the limits of this State*, pay annually, on or before first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the

case may be, to the auditor of the State of Colorado, a State license tax as follows:

Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

"SEC. 66. Every corporation which shall have failed to pay the tax provided for in Sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

Specification of Errors.

The plaintiff in error contends:

(1.) That a contract resulted from its compliance with the law of Colorado in 1899 and 1901, and that the law of 1902, if valid, would impair the obligation of that contract, and hence it is void under Sec. 10 of Art. 1 of the Constitution of the United States.

(2.) That the corporation was, when the law of 1902 was passed, a person within the jurisdiction of the State of Colorado, and that that law, if valid, would deprive it of the equal protection of the law, and hence it is void under the Fourteenth Amendment to the Constitution.

If the law is void for either reason, the judgment of the Supreme Court of Colorado was erroneous, of course.

Assignment of Errors, pp. 66 to 69.

POINTS.

I.

The law of 1902 is void because it would impair the obligation of the contract between the corporation and the State of Colorado which resulted from compliance by the former with the laws of the latter relating to foreign corporations, including the payment to the State in April, 1899, of $9,792.50 and the payment in May, 1901, of $5,250, on increase of stock.

A.

A binding contract between the State and the corporation was thus made—a contract based upon a valuable and substantial consideration.

The transaction was a purchase of a franchise. Such franchise was of the same character as the franchise enjoyed by a domestic corporation, and it was bought and paid for.

For a consideration, the State granted the right to do business as a corporation to an association already incorporated under the laws of another State, with precisely the same effect as under its general corporation law it grants the same right to an association not elsewhere incorporated.

The franchise of doing business as a corporation given by one State is not operative beyond its boundaries. This association could not claim such franchise in Colorado because it had secured it in New Jersey. The law of New

Jersey had no extra-territorial power. The association could secure a like franchise operative in Colorado only from that State. But it found provision made therefor in its statutes. Certain things it must do—very similar to what must be done to incorporate in Colorado originally—and certain payments must be made, and thereby the association would acquire the right to do business as a corporation in Colorado. It did these things, it made the payments required; and so it got that right.

It was expressly provided that it should be subject to "all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of this State." It is so subject. There is no dispute about this. But incorporation or the privilege of doing business as a corporation, this association, theretofore incorporated in New Jersey, got from the State of Colorado, as fully and completely as it might have got it by originally incorporating under the Colorado law; subject to liabilities, restrictions and duties *in like manner* as companies originally incorporated there; *and not otherwise*.

The intention of the Colorado law was to create substantial uniformity as to corporations, whether originally incorporated in or out of the State, which have complied with its conditions for acquiring the right of incorporation within its boundaries.

And this was decided by the Supreme Court of that State in *Iron Silver Mining Co.* v. *Cowie*, 31 Col., 450. It was there held that the twenty year restriction of the continuance of corporate existence, or in other words, of the right of doing business in the State, applied to foreign corporations which had secured such right. The Court in disposing of a preliminary question as to jurisdiction, held that what the foreign corporation had got by such compliance, was a *franchise*. Remarking that the statute was substantially the same as the Illinois

law, the Court quoted from the opinion in Stevens *v.* Pratt, 101 Ill., 208, 217, as follows:

> "The manifest and only purpose was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law."

And it held the twenty year restriction applicable to foreign corporations, because otherwise there would not be "that uniformity in the powers, liabilities, duties and restrictions of the two kinds of corporations, which it was the object of this clause to secure."

Compliance with the law by a foreign corporation, including payment of the required fee (to use the language of the Supreme Court of Colorado in this case), "entitles it to come into that State to do business as a corporation, and gives it a standing similar to that which is secured by a domestic corporation which files its original certificate of incorporation with the Secretary of State and pays the prescribed fee therefor" (p. 60).

The franchise being substantially the same as the corporate franchise of a domestic corporation, the grant thereof, being made for a valuable consideration, is a contract within the protection of the Constitution.

Formerly the rule of comity was relied upon for permission to exercise the franchise of doing business as a corporation, outside of the State of original incorporation. In Colorado and in almost all the States, this rule is supplanted by statute law. Many such laws require filing of papers, appointment of an agent, &c., but no substantial payment. But the law before the Court, following a somewhat general later practice, requires payment of a substantial sum for the use of the State as the price of the franchise.

Every franchise is not a contract. It may be a mere revocable license. A necessary element of a

contract is a consideration. This is true of a contract between a corporation and the State.

It is not necessary to consider whether investments made upon the faith of such a franchise are sufficient consideration, so that thereafter the grant of the franchise must be deemed a binding contract. (*Powers* v. *Detroit, &c., Ry. Co.*, 201 U. S., 543). For in this case not only was such investment made up to millions, but a substantial sum was required to be paid and was paid at the time of the grant. Here there can be no question as to the consideration.

Not until the State sets a price upon such franchises, do all the elements of a contract appear immediately. But when the State *sells* such a franchise, there is a contract, the obligations of which cannot be impaired by subsequent legislation. The grant itself may reserve the right, under certain conditions, to revoke or amend the franchise; and then, of course, revocation or amendment *according to the terms of such reservation* is permissible. But the obligation of the contract, whatever its extent or its limitations, cannot be impaired.

Examples of grants of franchises to foreign corporations, which were mere licenses—not contracts--because they lacked the element of consideration, may be found in the decisions of this Court.

In many cases this Court has refused to hold a franchise of exemption from taxation to be a contract, impaired by subsequent laws, because no consideration was given.

This Court has never held that a franchise to do business as a corporation, *granted for a valuable consideration*, is a mere revocable license.

In this case an application is made to the State of Colorado for a charter—for authority to do business *as a corporation* in the State, or, in other words, for the privilege of incorporation in the State. A substantial payment is required, and such payment being made the charter is granted; and thereafter the corporation invests millions in the

State and proceeds to do business there. There is more here than in the Dartmouth College case. To use the words of Chief Justice Marshall: "It can require no argument to prove that the circumstances *of this case* constitute a contract"—a contract protected by the Constitution.

As held by the Supreme Court of Colorado in this case, this company got by purchase substantially what is given for a consideration in the incorporation of a domestic corporation.

B.

The contract was that, in consideration of the payments made, the corporation should have the right to do business in the State as a corporation for twenty years, subject, of course, to the same liabilities, restrictions and duties as domestic corporations.

There is no time limit set otherwise than by reference to the law relating to domestic corporations (Mills Ann. Stat., § 473). Without this limit the privilege would be perpetual. With this limit it is restricted to twenty years (Iron Silver Mining Co. *v.* Cowie, *supra*).

What the corporation got in this case was not a mere revocable license.

In Home for the Friendless *v.* Rouse, 8 Wall., 430, speaking of an act giving an exemption from taxation without any time stated, this Court said:

> "To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the Legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value, if the Legislature, without taking di-

> rect action on the subject, could at its will resume the power of taxation."

Quoted with approval in
Powers *v.* Detroit, etc., Ry. Co., 201 U. S., 543.

The right is subject to the same liabilities and restrictions as the similar right of domestic corporations. But unless provision can be found under which the right of a domestic corporation to do business may be terminated within the period of twenty years, then the right of a foreign corporation, which has complied with the law, cannot be terminated within a corresponding period.

If an individual had sold the right to do business on his premises and received a substantial sum therefor, would he be heard to claim that what he had sold was nothing but the right to do business so long as he chose to permit? Could he arbitrarily, or in any way except in pursuance of some right expressly reserved, terminate the right as soon as he had got the money paid for it in hand?

There is nothing contrary to this contention, in the opinion of the Supreme Court of Colorado. Indeed, it is distinctly held that by compliance with the law this corporation acquired

> " a standing similar to that which is secured by a domestic corporation which files its original certificate of incorporation with the Secretary of State and pays the prescribed fee therefor."

C.

The Law of 1902, therefore, must be condemned as impairing the obligation of such contract, unless it can be justified under the provision by which alone the grant is limited, that the corporation shall be subjected to the liabilities, restrictions and duties imposed on like domestic corporations.

D.

It cannot escape condemnation upon the charge that it impairs the obligation of contract, by reference to the reservation of power to alter, revoke or annul corporate charters.

Article 15, Section 3, of the Colorado Constitution provides:

> "The general assembly shall have power to alter, revoke or annul any charter or incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, *whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the corporators.*"

The power to alter or revoke is not absolute. It is materially qualified.

There is a wide distinction between the power to alter or annul here reserved, and the unrestricted reserved power in the laws and constitutions of many States. This is clearly pointed out by this Court in *Vicksburg* v. *Vicksburg Water Works Company*, 203 U. S. As clearly as in that case the burden here sought to be imposed works injustice to the corporators of defendant. It compels them to pay again and to pay twice as much as like domestic corporations for the power to continue to carry on its business during the twenty years for which it received a franchise.

It could not possibly have been the opinion of the General Assembly that the charters or incorporations affected were injurious, since the law relates to every corporation, domestic and foreign, doing business in the State, and attempts to prevent them from doing business only until the so-called license tax is paid.

This article was not relied upon by the Attorney-General in the Colorado courts; and it is presumed it will not be relied upon here.

E.

Nor can it escape such condemnation, by reference to Section 654 of the law in regard to corporations.

That section provides that

> "The general assembly may, at any time, alter, amend, or repeal this act, and shall, at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act."

This statute must be read with the constitutional provision last referred to, which limits the power of the Legislature to alter or amend charters by conditions expressed in the words in italics. The people of Colorado wrote these words into their constitution to protect investments made in that State through corporate stocks and bonds from destruction or impairment by arbitrary or unnecessary action by the Legislature. The people have declared that the Legislature cannot reserve absolute power to alter or amend charters.

Nothing is pertinent here unless it be "to prescribe such regulations and provisions as it may deem advisable," and this can be applicable to foreign companies only because they are subjected to the *same* liabilities as domestic companies. It cannot justify putting upon foreign companies a *double burden* as compared with domestic companies.

Nor was this section relied upon by the Attorney-General in the Colorado courts.

F.

Nor can it escape such condemnation by reference to the taxing power of the State.

Liability to taxation is common to all persons, natural or corporate, with respect to their property in the State, except in case of special exemption. This company does not claim exemption from taxation; it merely denies the power of the State to make it buy again what it has already bought and paid for. The Legislature may tax the franchise, as it may tax other property, but it cannot destroy the title thereto, or require it to be bought again *as a condition of its further enjoyment.* If land is sold by the State, the Legislature may tax the land, but it cannot recall the title, or require a further payment to be made *as a condition* of its further use.

The Law of 1902 does not impose a tax upon the franchise; indeed it does not impose a tax at all, if the word is used in a proper sense.

In *Metropolitan Street Railway Co.* v. *New York*, 199 U. S., 1, and *Brooklyn City R. R. Co.* v. *New York*, 199 U. S., 48, the tax considered was indisputably a tax upon the franchise as property. It was not a "license fee" which "is understood to be a charge *for the privilege of carrying on a business or occupation*" (199 U. S., 50). The franchise was held to be taxable because "it is *property* which, though intangible, exists" (199 U. S., 39). "As it is *property*, it is required to contribute its ratable share, dependent only upon value, toward the support of the Government." The franchises considered in these cases were prerogative franchises, not mere corporate franchises, not mere grants of the privilege of incorporation. In *Home Ins. Co.* v. *New York*, 134 U. S., 594, and in Horn Silver Min-

ing Co. *v.* New York, 143 U. S., 305, a like view seems to have been taken of a *tax upon* the "corporate franchise or business." See also, *State Railroad Tax Cases*, 92 U. S., 575; Central Pacific R. Co. *v.* California, 162 U. S., 91, 127.

But that is not the nature of the tax (so called) in this case. It is not a tax upon a franchise, but a license fee required *as a condition* of the right to do business as a corporation. But this right had already been granted to this company, this right it already had, having bought and paid for it; it had already *entered the State* under a franchise to do business there as a corporation, theretofore granted to it and which it was then enjoying. This franchise might be taxed, subject to all the constitutional limitations upon the taxing power. But it is not taxation to require the payment of "a conventional price or bonus" for the further enjoyment of the franchise already acquired by purchase.

In *Adler* v. *Whitley*, 44 Ohio St., 539, the Court said:

> "The difference between a tax upon a business and what might be termed a license is that the former is exacted by reason of the fact that the business is carried on, and the latter is exacted as a condition precedent to the right to carry it on.

There are no constitutional limitations as to conditions which may be imposed for the *admission* of foreign corporations. The State may be as arbitrary as it pleases (Paul *v.* Virginia, 8 Wall., 168; Pembina Cons., &c., Mining Co. *v.* Pennsylvania, 125 U. S., 183). But when, after admission, it *taxes* the franchise or right to do business, as it may do, then it is constrained by the limitations of the Federal and State Constitutions. What the State of Colorado undertook to do in this law was to impose a license fee *as a condition of doing business*, not to *tax* the franchise or *right to do business*

already acquired. A license fee and a tax upon a franchise or business are two different things.

In respect to the meaning and effect of the Law of 1902, this Court will not be concluded by the opinion of the Supreme Court of Colorado.

> *Atchison, Top. & S. F. Ry. Co.* v. *Matthews*, 174 U. S., 100.
> *Sterns* v. *Minnesota*, 179 U. S., 223.
> *Powers* v. *Detroit, &c., Ry. Co.*, 201 U. S., 543.

The Law of 1902, § 65, provides that

> "every foreign corporation which has heretofore obtained * * * the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and *as a condition precedent to its right to do any business within the limits of this State*, pay annually * * * to the Auditor of the State of Colorado, a State *license* tax as follows-"

The next section provides the penalty that the corporation shall "*forfeit its right to do business* within the limits of this State, until such tax is paid, and shall be absolutely and wholly *deprived of all such right and privilege;* and the fact of such failure may be pleaded," &c.

There is no other penalty. There is no method of collecting this so-called tax.

Section 68 of the law calls this a *fee:* "The *fees* provided for in Sections 64 and 65 are in addition to the other *fees* and *taxes* provided by law."

Is not this clearly a license fee fixed as a condition of doing business and not a tax upon the franchise or business?

It is by its very terms a *license* fee. It cannot be "construed" to be a tax. And to so construe it, would bring it into conflict with the Colorado Constitution, which provides (Art. X., sec. 3): "All taxes shall be uniform upon the same class of sub-

jects within the territorial limits of the authority levying the tax;" the act imposing on foreign corporations such as this *double* the burden imposed upon like domestic corporations.

The distinction between license fees and taxes is elucidated by two cases of the same title—*Erie Ry. Co.* v. *Pennsylvania*—one in 21 Wall., 492, and the other in 153 U. S., 628.

In 1841 Pennsylvania passed an act permitting a New York corporation to operate its railroad in the State for a distance of fifteen miles. In 1846 the company was authorized to extend its road, one condition being that the company should pay the State annually $10,000, and that stock of the company to an amount equal to the costs of construction of the railroad in Pennsylvania should be taxed at the same rate as other similar property, the company making payment of the tax upon such stock to the State.

In 1868 the Legislature imposed a *tax* on the gross receipts of all railways doing business in the State. The Court held that nothing being said in the original grant about exemption from further taxation, the obligation of contract was not impaired. The payments imposed by the earlier laws were a price for the franchise or right to build and operate the railroad in Pennsylvania, and a tax upon a part of the stock. The later tax, the legality of which was questioned, was a general property tax imposed upon gross receipts, and was neither in form nor substance a demand of further payment for the right the State had sold the company to build its road and operate in Pennsylvania (21 Wall., 492).

In 1885 a law was passed requiring the treasurer of every corporation doing business in the State to deduct three mills on every dollar of interest paid on its bonds held in the State. The Court held that this act violated the obligation of a contract, saying:

> "Those acts prescribe the terms and conditions upon which Pennsylvania assented to

the company's constructing and operating its road through limited portions of its territory. * * * Consistently with those terms and conditions Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the State, in the exercise of its police powers, for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits."

"The argument in behalf of the State leads, logically, to the conclusion that, notwithstanding the provisions of the acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of constructing and operating its road in that State, Pennsylvania could, in its discretion, change those terms and impose any others it deemed proper. If the State amended those acts so as to increase the sum to be paid annually into the state treasury, as a bonus, from ten thousand to one hundred thousand dollars, the argument made by its attorney general would sustain such legislation upon the ground that the State, at the outset, could have exacted the larger amount from the company as a condition of its entering the State with its road. To any view which assumes that the State could—so long at least as the railroad company performed the conditions of the acts of 1841 and 1846—burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent."

(153 U. S., 628.)

The Law of 1897 under which this company paid $15,000 and more for the privileges of incorporation, provides that the fee shall be paid on filing the certificate of incorporation and that no corporation "shall have or exercise any corporate powers, or be

permitted to do business in this State until the said fee shall have been paid"; and of this the Supreme Court of Colorado in this case says:

> "The fee * * * *is not, in any sense, a tax.* It is the conventional price or bonus which the corporation pays to the State for the privilege of entering this State to do business as a corporation."

The Law of 1902 says that this company must on May first in each year pay a so-called license tax "*as a condition precedent to its right to do any business within the limits of this State*"; and nonpayment simply works a forfeiture of the right. Using the words of the Supreme Court of Colorado, we say of this co-called license tax that it "*is not, in any sense a tax*"; and so it cannot be justified under the taxing power.

If this license fee were really a tax, a tax upon the franchise as property, it would violate the Constitution of Colorado requiring uniformity in taxation. The Supreme Court of Colorado, in holding that there is no violation of this provision, practically holds that this is not a case of *taxing* franchises as property, like the cases arising under the New York Franchise Tax in 199 U. S. The same thing cannot be a *tax*, to avoid the provision of the Colorado Constitution which forbids bills containing more than one subject and requires the subject to be expressed in the title, and to avoid the Federal prohibition against laws impairing the obligation of contract; and "*not a tax*," to avoid the constitutional requirement of uniformity in taxation, and the provisions of the Fourteenth Amendment. In Graham *v.* Folsom, 200 U. S., 253, it is said: "But Courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the State, but they will not ignore the effect of its action." This Court not being required to accept the decision of the Colorado Court as to

the meaning of this act certainly will not follow that Court into such inconsistencies. It will find that though these provisions are inserted in a revenue law that they really impose a license fee "as a condition precedent" to the further exercise of a privilege heretofore granted, they really attempt to make the company buy again what it has already bought and paid for and so to impair the obligation of the contract of purchase; or if this Court shall be able to find that this law imposes a tax, it will not forget this finding, when it comes to consider whether it violates the rule of equal protection. (See Point II.)

G.

Foreign corporations are not outside of the protection of the Constitution, for the reason that the States may impose conditions as to their admission.

In his dissenting opinion in *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S., 308, 332, Mr. Justice Harlan says:

> "It is one thing for a State to forbid a particular foreign corporation, or a particular class of foreign corporations, from doing business at all within its limits. It is quite another thing for a State to admit or license foreign corporations to do business within its limits, and then subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation, doing business in Texas under its license or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States and cannot therefore be enforced against it, the State need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a condition of the right of the corporation to do business, and, whether

constitutional or not, must be respected by the corporation."

In that case the law questioned was on the statute books when the corporation was admitted, when it got its permit to do business. Mr. Justice Harlan and Mr. Justice Brown maintained that notwithstanding that fact, the corporation could question its constitutionality. There is nothing in the opinion to indicate—and it cannot be believed—that the majority would have disputed the right of the corporation to question the constitutionality of the law, if it had originated after the corporation acquired the right to do business in the State.

II.

The corporation was a person within the jurisdiction of the State of Colorado, and the Law of 1902 was void because it did not give to it the equal protection of the law.

A.

The corporation was a person within the jurisdiction of the State of Colorado.

"A corporation is a person within the protection of the Fourteenth Amendment."

Lake Shore & M. S. R. R. Co. *v.* Smith, 173 U. S., 688, 690.

Citing:

Minneapolis & St. Louis R. R. Co. *v.* Beckwith, 129 U. S., 26.

Smythe *v.* Ames, 169 U. S., 522.

These decisions apply, notwithstanding this corporation was originally incorporated under the laws of another State.

It is not questioned that, as said by the Supreme Court of the United States in *Pembina Cons. &c., Mining Co.* v. *Pennsylvania*, 125 U. S., 183:

> "The States may, therefore, require for *the admission* within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment."

But after their admission, in other words, when they are lawfully within the State by compliance with the conditions imposed by its statutes, especially when such conditions involve the payment of money, then they are persons within its jurisdiction and are protected by this clause of the Fourteenth Amendment. This is implied, at least, in the opinion in that case.

In *Philadelphia Fire Association* v. *New York*, 119 U. S , 110, Mr. Justice Harlan, dissenting, says:

> "Under the decision just rendered, the State of New York is permitted to subject a corporation of another State, within her limits by her consent, to higher taxes with respect to its business than is imposed there upon similar corporations of other States."

The difference between Mr. Justice Harlan and the majority of the Court seems to have been upon the question whether the corporation was within the limits of New York by her consent, the position of the majority, as stated in the headnote in the Lawyers' Edition, being as follows:

> "A foreign corporation is not within the jurisdiction of the State of New York until it

> has complied with the laws of the State as to payment of license fees, taxes and deposit of securities, &c. A corporation having complied with the law and received a license *for a year* is within the State *for that year;* but it is within the power of the State to change the conditions of admission at any time *as to the future*, and if it makes such a change for the future the foreign corporation is not within the State *after the expiration of the year* for which it was licensed *until it has complied with the law.*"

It is not understood that the majority took exception to Mr. Justice Harlan's statements in the next paragraph of his opinion. Referring to the announcement of the Chief Justice in *Santa Clara Co.* v. *Southern Pacific R. R. Co.*, 118 U. S. 396, that the Court did not wish to hear arguments on the question whether this provision of the Fourteenth Amendment applied to corporations, and that the Justices were all of opinion that it did, Mr. Justice Harlan says:

> "This, it is true, was said in regard to corporations of the particular State where legislation was assailed as unconstitutional; but it is equally clear that a corporation of one State, doing business in another State *by her consent*, is to be deemed a 'person' within the jurisdiction of the latter State, in the meaning of the Fourteenth Amendment."

Nor is it understood that the majority took exception to what Mr. Justice Harlan said in the next paragraph:

> "So a corporation of one State doing business by its agents in another State *by the latter's consent* is denied the equal protection of the laws, if its business there is subjected to higher taxation than is imposed upon the business of like corporations from other States."

It may or may not be true, that a corporation admitted by a mere license, revocable at will, is practically outside of such protection, when the Legislature impliedly revokes such license by enacting new conditions of its stay. We need not argue that case; it is not the case before the Court. This corporation got the right to do business as a corporation in Colorado, or in other words got the privilege of incorporation in that State, by grant and for valuable consideration. It is not then under a mere license revocable at will. It got from the State of Colorado substantially what it would have got by original incorporation there, or, to quote from the opinion in this case, "*a standing similar to that which is secured by a domestic corporation which files its original certificate*," &c. (see Point I., A).

If the fiction of the artificial person or legal entity, and the theory that incorporation *creates* such person or entity, are applied to this body of natural persons, which acquired the privileges of incorporation first in New Jersey and later in Colorado, we may say, in the language of the Court in *Ohio & Mississippi R. R. Co* v. *Wheeler*, 1 Black, 286: "It has no legal existence in either State except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised." The corporate existence of this company within the State of Colorado is created—in the language of the fiction—by the laws of Colorado. Precisely to the same extent and for the same reasons as a domestic corporation, it is " a person within its jurisdiction."

In a number of cases where foreign corporations doing business in a State have invoked the protection of the clause of the Fourteenth Amendment forbidding States to deny persons within their jurisdiction the equal protection of the laws, this Court has passed upon the question without questioning that such corporations may be persons within the

jurisdiction of the State. *Oriental Insurance Co.* v. *Daggs*, 172 U. S., 557; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S., 89; *W. W. Cargill Co.* v. *Minnesota*, 184 U. S., 452.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 450, this question seems finally to have been passed upon by this Court, the protection of the Fourteenth Amendment being therein held to be effective in favor of a foreign corporation.

B.

The law of 1902 denies to foreign corporations the equal protection of the laws, because it requires them to pay as an annual license tax twice as much as domestic corporations in like circumstances.

See §§ 64 and 65 (*ante*, p. 5), one as to domestic and the other as to foreign corporations. A domestic corporation, if its capital exceed $25,000, is required to pay *two* cents per $1,000; a foreign corporation, whatever its capital, is required to pay *four* cents per $1,000, unless its shares are less than $1, and then *two and one-half* cents per 1,000 shares.

The Fourteenth Amendment requires

> "that no *greater burdens* should be laid upon one than are laid upon others in the same calling and condition."
>
> Barbier *v.* Connolly, 113 U. S., 27, 31,
> Connolly *v.* Union Sewer Pipe Co., 184 U. S., 559.

or, in other words,

> "that the law shall operate equally and uniformly upon all persons in similar circumstances."
>
> *Kentucky Railroad Tax Cases*, 115 U. S., 321, 337,

or, in other words,

> "that all persons subjected to such legislation shall be treated alike under like circum-

> stances and conditions, both in privileges conferred and liabilities imposed."
>
> Hayes *v.* Missouri, 120 U. S., 68.

> "The equal protection of the laws is a pledge of the protection of equal laws."
>
> Yick Wo *v.* Hopkins, 118 U. S., 356.

In *Cotting* v. *K. C. Stock-Yards Co.*, 183 U. S., 79, this Court said:

> "We must, nevertheless, always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied where upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

As is said by Mr. Justice Harlan in *Philadelphia Fire Ass.* v. *New York* 119 U. S., 110, 121:

> "An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community."

He goes on to apply the principle to corporations, domestic and foreign.

The requirement of twice as much from foreign as from domestic companies cannot be justified upon the theory of reasonable classification.

In *Gulf, Colorado & S. F. Ry. Co.* v. *Ellis*, 165 U. S., 150, this Court says:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to

> the attempted classification—and is not a mere arbitrary selection."

And this is quoted in Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540, 560.

According to this law, every corporation which has obtained the right to do business in the State, whether a domestic or foreign corporation (excepting domestic corporations having less than $25,000 capital) must on May first in each year, as a condition precedent to its continued exercise of that right, pay an annual license tax. This tax is *two* cents per $1,000 for domestic corporations and *four* cents per $1,000 for foreign corporations, except those whose shares are less than $1.00, and for them it is more than *two and one-half* cents per $1,000.

There is no reasonable ground for this difference, this classification. Under Point I. (pp. 7, 8, 9, 13) it has been pointed out that the grant under the general laws of Colorado to domestic corporations upon their incorporation and to foreign corporations upon their complying with the laws herein referred to is in substance the same; foreign and domestic corporations, when this law was enacted, had substantially the same status; sustained the same relations to the State; enjoyed the same contract rights, and were in like manner protected, with respect thereto, by the Constitution. Colorado had substantially said that any association, whether already incorporated elsewhere or not—that did not concern Colorado—might obtain the privileges of incorporation in Colorado, by complying with certain conditions. The fees to be paid were the same, and the requirements were the same otherwise, in substance. If the association had not been incorporated elsewhere, it must file articles of agreement; but if it had already filed such articles elsewhere, that is in the State of original incorporation, a certified copy of such articles and of the general law, which became part thereof in legal effect, could be filed instead. These

requirements being complied with, the corporations differed scarcely at all except in name, and were substantially the same in the view of the State, whose purpose it was to secure

> "uniformity in the powers, liabilities, duties and restrictions of the two kinds of corporations."

It is believed that the thought of such classification would not have occurred to any one, if it were not for the fiction of the creation of a legal entity by incorporation. This is a fiction which has been and is of value and which deserves respect. But it is responsible for some confusion of thought. Nothing is really created by incorporation, of course; but, simply, a privilege is given to individuals to do business under peculiar conditions. This company, in Colorado, has that privilege by the law of Colorado. It is a matter of no concern to Colorado whether the same association of men has the same privilege elsewhere. So far as the State of Colorado is concerned, whatever of incorporation this company has came from its grant—a grant substantially the same and upon the same conditions as if the same association of men had come first to Colorado, without having previously got this privilege in New Jersey. The privilege of doing business here, granted by this State, is precisely the same whether the grantee has or has not such privilege elsewhere. There is no difference to justify the classification made in this law. The difference lies in fiction only.

> "What is reasonable is a question of practical detail, *into which fiction cannot enter.*"
> *Kidd* v. *Alabama*, 188 U. S., 730, 733.

It matters not under what power this law is deemed to be enacted, the taxing power, the police power or any other power, if it violates the rules of equality of protection, it is void.

III.

If the so called "license tax" is really a tax, the law is void under Point II; and if it is not a tax, the law is void under Point I.

The Supreme Court of Colorado calls it a tax for one purpose and treats it as not a tax for another purpose. But it must be one thing or the other.

LASTLY.

The judgment should be reversed, with costs.

THOMAS THACHER,
Of Counsel for Plaintiff in Error.